

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JANE-FRANCES AKPAMGBO and MICHAEL
EMEKA AKPAMGBO,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

No. CV-08-239-FVS

ORDER GRANTING AND
DENYING THE DEFENDANT'S
MOTION TO DISMISS

THIS MATTER comes before the Court without oral argument based upon the United States' motion to dismiss or, in the alternative, for judgment on the pleadings or, in the alternative, for summary judgment. The United States is represented by Andrew S. Biviano. The plaintiffs are represented by Robert P. Hailey.

BACKGROUND

Jane-Frances Akpamgbo, M.D., signed a one-year contract with Spectrum Healthcare Resources, Inc., to work as a civilian physician at Fairchild Air Force Base. Dr. Akpamgbo was supervised by Lieutenant Colonel Robby C. Riddle, M.D. Dr. Akpamgbo and her husband, Michael Emeka Akpamgbo, allege Dr. Riddle created a hostile work environment based upon Dr. Akpamgbo's race, sex, and national origin. They allege she complained to Dr. Riddle's superior officer, but he failed to ameliorate the effects of Dr. Riddle's invidious hostility toward Dr. Akpamgbo. Furthermore, when Dr. Riddle learned

1 of her complaint, he allegedly retaliated against her, by among other
2 things, initiating an administrative review of her competence as a
3 physician. Dr. Akpamgbo and her husband have commenced an action
4 against the United States under the Federal Tort Claims Act ("FTCA").
5 The United States moves to dismiss. Fed.R.Civ.P. 12(b)(1). In the
6 alternative, the United States moves for judgment on the pleadings,
7 Fed.R.Civ.P. 12(c), or for summary judgment. Fed.R.Civ.P. 56(c).

8 **RULING**

9 Dr. Akpamgbo may have been an independent contractor or she may
10 have been a federal employee. The parties have not indicated which
11 test governs the determination of her status; and there is more than
12 one candidate. *Compare Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292
13 (9th Cir.1999) (whether a franchise agreement created an employment
14 relationship that was covered by Title VII of the Civil Rights Act of
15 1964), *with Lopez v. Johnson*, 333 F.3d 959, 963 (9th Cir.2003)
16 (whether a person who worked for a company that provided services to
17 the United States Navy was a federal employee for purposes of section
18 501 of the Rehabilitation Act of 1973). Nor have the parties
19 attempted to apply the governing test to the facts of this case.
20 Consequently, Dr. Akpamgbo's employment status is unclear.
21 Determining her status is essential. As a general rule, "section 717
22 of Title VII, 42 U.S.C. § 2000e-16, provides the exclusive,
23 pre-emptive remedy for federal employees seeking to redress employment
24 discrimination." *Sommatino v. United States*, 255 F.3d 704, 711 (9th
25 Cir. 2001). However, there is an exception to the general rule. A
26 federal employee may assert an FTCA claim when the defendant's

1 "alleged violations have gone beyond discrimination in the workplace
2 and involve physical or emotional injuries that are highly personal."
3 *Id.* In view of the preceding rules, the Court declines to address the
4 merits of Dr. Akpamgbo's FTCA claim until her employment status is
5 resolved and it is clear she may assert a FTCA claim. Her husband's
6 FTCA claim is a different matter. He has offered no evidence
7 demonstrating he exhausted his administrative remedies. As a result,
8 the Court lacks jurisdiction over his FTCA claim. *See Jerves v.*
9 *United States*, 966 F.2d 517, 519 (9th Cir.1992).

10 **IT IS HEREBY ORDERED:**

11 1. The Court grants the United States' motion to dismiss Michael
12 Emeka Akpamgbo's FTCA claim (**Ct. Rec. 18**).

13 2. The Court denies the United States' motion to dismiss Jane-
14 Frances Akpamgbo's FTCA claim (**Ct. Rec. 18**); provided, the United
15 States may refile its motion.

16 3. The Court grants the Akpamgbos' motion to amend their
17 complaint. They may have 30 days in which to file an amended
18 complaint.

19 **IT IS SO ORDERED.** The District Court Executive is hereby
20 directed to enter this order and furnish copies to counsel.

21 **DATED** this 24th day of March, 2010.

22
23 S/Fred Van Sickle
24 Fred Van Sickle
25 Senior United States District Judge
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